UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ARTHUR S. WEISSBRODT, JUDGE

In Re: JAMES MADISON KELLEY, Debtor.	) Case No. 08-55305-ASW) Chapter 11)))
JAMES MADISON KELLEY, Plaintiff, v. JPMORGAN CHASE BANK, NA, Defendant.	) Adv. No. 10-05245)) PLAINTIFF'S MOTIONS to) COMPEL PRODUCTION of) DOCUMENTS and the DEPOSITION) of THOMAS VAN; and the) FDIC's MOTION to QUASH) the SUBPOENA)) Friday, October 4, 2013) San Jose, California

Appearances:

For the Plaintiff:	James M. Kelley, *pro se* 14390 Douglass Lane Saratoga, California 95070
For the FDIC, as Receiver for Washington Mutual Bank (via telephone):	Veronica Gray, Esq. Nossaman LLP 777 South Figueroa Street, 34th Floor Los Angeles, California 90017
For the Defendant (via telephone):	Thomas S. Van, Esq. Alvarado Smith APC 1 MacArthur Place, Suite 200 Santa Ana, California 92707
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Friday, October 4, 2013 3:27 o'clock p.m.

P R O C E E D I N G S

THE COURT: Okay. Kelley versus JPMorgan Chase.

MR. VAN: Your Honor, —

THE COURT: Wait a second — wait a second. I'm going to take the appearance of men in court and then people on the phone.

MR. KELLEY: James Kelley, plaintiff.

THE COURT: And now Veronica Gray?

MS. GRAY: Correct. Veronica Gray of Nossaman on behalf of FDIC as receiver.

THE COURT: And Thomas Van?

MR. VAN: Yes, Your Honor. Thomas Van on behalf of JPMorgan Chase Bank.

THE COURT: And Ellen Cha? Ellen Cha?

MS. CHA: Your Honor, I'm here appearing telephonically, but I'm not scheduled for Court Docket Number 2.

THE COURT: Oh, okay. I'm sorry. You're absolutely right. Okay.

Before the Court are three motions: Plaintiff's motion to compel production of documents, plaintiff's motion to compel deposition of Thomas Van, and the FDIC's motion to quash subpoena. The plaintiff appears in pro per, defendant is represented — was represented by Christopher Yu. But who is on the counsel now?

MR. VAN: Thomas Van, Your Honor. We're in the same firm.

THE COURT: Okay. And the FDIC is represented by Amber Grayhorse. The plaintiff —

MS. GRAY: Amber —

THE COURT: I'm sorry, what?

MS. GRAY: Amber Grayhorse is on maternity leave and I've been on the case with her. I'm the partner in charge of the case, Veronica Gray.

THE COURT: Okay. Very good, Ms. Gray. Thank you.

MS. GRAY: Thank you.

THE COURT: So plaintiff's motion to compel — this is A and B — production of documents is set for a status conference today. Plaintiff has requested a *Daubert* hearing regarding the qualifications of plaintiff's expert. However, the Court has decided it would be more expeditious to have the proposed expert file a declaration that addresses the relevant factors regarding qualification and then permitting defendant to depose plaintiff's proposed expert.

Now when will I get the declaration, Mr. Kelley?

MR. KELLEY: Well, it's just a declaration of his qualifications.

THE COURT: No, he has to go — I handed you in court the qualifications to be an expert witness.

MR. KELLEY: Oh, yes.

THE COURT: So he has to —

MR. KELLEY: Yeah, we're working that already, so.

THE COURT: So he has to provide a declaration that explains why he meets that standard.

MR. KELLEY: Okay. We could do it in a couple of weeks. We've been working on it for —

THE COURT: That's fine.

MR. KELLEY: — three weeks.

THE COURT: That's fine. The end of October?

MR. KELLEY: Yeah, October 31st. Yeah, that would be good.

THE COURT: Then after that defendant can depose plaintiff's expert. Can you depose him during the month of November?

MR. VAN: Yes, Your Honor. I do have two trials in November, one going on the 4th right now, and one I believe on the 18th. So it will be a little tight. I would suggest that by the — November, early December, if we can schedule something with the plaintiff.

THE COURT: That's fine. You depose him by December 12th.

What date is December 12th, Brook, what day of the week?

MR. VAN: I have it at Thursday, Your Honor.

THE CLERK: Thursday.

THE COURT: Yeah. So by December 13th, that's fine. Okay.

MR. VAN: Yes, and —

THE COURT: That's fine.

MR. VAN: Your Honor, just a clarification. May we file a declaration in opposition after that?

THE COURT: Sure. But if you're going to file it, file it within two weeks after that.

MR. VAN: Yes, Your Honor.

THE COURT: So it's not clear what the status is of the documents plaintiff claims still have not been produced. Is it Chase's position that all documents have been produced?

MR. VAN: Yeah, — well, Your Honor, the motion, the first motion relating to JPMorgan itself, we have produced all the original documents relating to the loan. And that has been produced four times already, twice to plaintiff's experts, Roy Wetsell and James Blanco, neither of which filed any declaration regarding its authenticity.

The documents that are actually the subject of this motion that's been pending for quite a while now is the electronic database which plaintiff believes will somehow prove the unauthenticity of the original documents that we have in our possession. It is our position that electronic documents have no relevancy to the documents that we are holding now in front of us as to its original status. So that we — and the Court's

motion actually on April 26th at that hearing was inclined it to deny the plaintiff's motion, because there was no declaration from experts saying that our documents were not original. That's why we've been having these continuances, because Court has now allowed Mr. Kelley three chances to get the experts — an expert to say that our original documents that we have in hand are not originals. And so — and no declaration has been filed even after given two extra extensions. So I would be inclined that the Court deny the motion, because the most recent declaration that we see from Mr. Kelley is from a Roger Robowski who, without looking at the original documents that we have, opined in a previous declaration that our original documents are not original by looking at two copies. That's like saying I'm looking at two photographs of a tree and that based upon looking at these photographs the tree is not — is not there. It's fake.

THE COURT: What is the burden of producing these electronic files?

MR. VAN: The burden, Your Honor, is the relevancy portion of this because —

THE COURT: I'm not asking you about relevancy. I'm asking you strictly to address what the burden would be.

MR. VAN: Oh, that is a huge burden, because he's asking about the private databases —

THE COURT: Look, sir, there's been no privilege log. The propriety — all of that has nothing to do with that, because

you've not filed a privilege log. I'm asking solely about the burden, the physical burden, of transferring.

MR. VAN: The physical burden is actually finding the information, Your Honor. We would actually have to go through and find whatever he's looking for, which is very voluminous. And it's actually time-consuming. So part of it would be asking who's going to be paying for that? And he should pay for that if he wants that, but —

THE COURT: You haven't provided a declaration as to what it would take or how much it would cost. You have provided nothing, sir, nothing. You haven't provided a —

MR. VAN: Your Honor, —

THE COURT: — declaration about how many hours it would take, or who would have to do it, or what's involved, not one thing.

MR. VAN: And, Your Honor, we can provide that as part of our — part of any — any further supplementation.

THE COURT: It should have been provided a long time ago. If you had an objection to producing that on the grounds of burdensomeness that should have been produced a long time ago.

MR. VAN: Yes, Your Honor, but our main portion of the argument is that actually —

THE COURT: You don't get to go — you don't get to go seriatim. You don't get to go: Well, my argument number one

failed, now I'm going to raise number two, and then next month I'll raise number three. It doesn't work like that, counsel. You raise all of your arguments, you provide all your information, and the Court decides.

MR. VAN: Your Honor, based upon the last arguments we had, not even on what I'm — in terms of burdensome, the first part of our argument has always been the relevancy issue because there are two claims in the second amended complaint, which are the production of the notice of right to cancel under the Truth and Lending Act and what Mr. Kelley claims is to be nonoriginal documents that we have in our possession in terms of our client. And so the original documents —

THE COURT: You need to explain to me what possible burden there is of just transferring the electronic files.

MR. VAN: Your Honor, these are all electronic files that we don't even know what he's asking for, it's so voluminous and vague. We've gone to actually meet-and-confers with Mr. Kelley. We've gone through — as asked by the Court. We can't agree on these things because they're — they don't even relate to his loan, a lot of them. And the burden of having to go through all of that and finding of that I think would be secondary to the issue of —

THE COURT: I'm not asking the secondary issue. I'm asking solely what you have to do to to just transfer them and let him worry about finding them.

MR. VAN: Your Honor, there is an initial — that — that's — I'm not saying that's my first argument.

THE COURT: I want you to address that argument, sir. How many times do I have to tell you? I don't want you to keep going back and addressing a different argument. I want you to address that argument.

MR. VAN: Your Honor, I myself am not an IT person. So I would have to get the application. I would have to get a declaration to you. And I would request that the Court allow us to do that.

THE COURT: Well, why didn't you do it long before now?

MR. VAN: Your Honor, because the Court actually agreed with us in the original motion that the relevancy issue was the first part, that the — that's why the Court actually requested that plaintiff file an expert declaration to that particular claim because the real issue is we've already produced the records that are relevant to the action, which are the loan file and the original loan file.

So why would you go through and make JPMorgan or anybody else jumps through those holes if the relevant documents are already in front of us? That was actually the Court's rul- — part of the reasoning of the Court's ruling on April 26th and — though the Court was inclined to decline motion because of that.

THE COURT: Yes. But then we got this expert who's

testified — whether he's an expert or not remains to be seen — but this person who says he thinks they're phony. And so —

MR. VAN: But he shouldn't have been —

THE COURT: Wait a minute, wait a minute, I'm not trying it. But that's enough for me to let him have them.

MR. VAN: The original documents?

THE COURT: No, you have the —

MR. VAN: Yes, he —

THE COURT: No, the — what we're talking about —

MR. VAN: — electronic —

THE COURT: — the electronic files.

MR. VAN: — servicing records. Your Honor, —

THE COURT: Sir, look, I've had it. You have 20 days to provide the electronic files. No more discussions, no more excuses, just provide them. You haven't filed a privilege log. There's no privilege. You haven't filed a burdensome affidavit. There's no burden. Mr. Kelley has somebody who is very knowledgeable in certain areas who thinks they're phony. Provide them. Now —

MR. VAN: Your Honor, —

THE COURT: I'm not — I'm not hearing any more argument.

MR. VAN: — I want to be clear.

THE COURT: I'm not hearing any more argument. Twenty days, or you can be held in contempt.

Now what — when can your ex- — we've talked about this, your expert filing a declaration.

With respect to plaintiff's motion to compel the deposition of Thomas Van, the motion is premature for the reasons I will explain later. It appears that the subpoena was not properly served as the subpoena was incomplete. It's not clear to the Court that Mr. Van is a proper witness to be deposed in this matter. And the authorities cited by Mr. Van in his brief strongly supports the conclusion that as a general rule an attorney for a party should not be deposed.

Now, counsel, does the defendant intend to call Mr. Van as a witness for any purpose, any possibility in this litigation?

MR. VAN: No, Your Honor. This is Mr. — I am Mr. Van. Now I'm not going to be a witness in this case.

THE COURT: For sure, —

MR. VAN: Yes.

THE COURT: — 100 percent sure?

MR. VAN: I am not a witness in this case, Your Honor. I'm counsel for JPMorgan.

THE COURT: I understand. But sometimes counsel will for reasons that are particular to a case want to be called as a witness, because they are —

MR. VAN: I have no —

THE COURT: I'm not asking your intention. I'm saying

the defendant agrees never to call you as a witness. So we dispose of that issue.

MR. VAN: Your Honor, I have — yeah, I am not going to be a witness in the case.

THE COURT: All right. So defendant agrees never to call Mr. Van as a witness for any purpose in this litigation. The Court is not ruling at this time, but warns plaintiff that he should be prepared to address the objections raised by Mr. Van if and when plaintiff reserves the subpoena. For now the motion is denied without prejudice as premature. The idea that Mr. Van is on some witness list, Mr. Van was on the plaintiff's witness list, not on any defendant's witness list as far as we could tell. So that not an issue.

With respect to E through F, the Court is prepared to rule on third-party FDIC's motion to quash subpoena and will grant the motion without prejudice to Mr. Kelley reserving a subpoena in the event the documents cannot be obtained from the defendant. Mr. Kelley served a subpoena on the FDIC on March 14, 2013 seeking all records and loan documents from 11 electronic databases related to certain Washington Mutual Bank loans. The FDIC was appointed as receiver for Washington Mutual on September 25th, 2008 and the assets of Washington Mutual were sold to JPMorgan Chase. Receiver moves to quash on the grounds that the databases are not in the receiver's possession, but are in the possession of defendant Chase. Receiver argues that the

request is unduly burdensome, because Chase, not the receiver, has possession and custody of the database records.

Kelley objects to the motion arguing that Chase has a history of altering documents and therefore Kelley shouldn't have to rely on Chase to obtain the documents. Mr. Kelley also argues that the request is not unduly burdensome relying on an affidavit by Michael Zarro, Senior Vice President of default specialty operations with Chase, filed in an unrelated case stated that database documents can be produced by Chase within a week.

Mr. Kelley also alleges that the receiver has a vested interest in blocking discovery because it has an 80-to-20-percent loss sharing agreement with Chase. Mr. Kelley alleges that only a few of the electronic databases have been produced and that Chase has explicitly refused to produce a privilege log. It's up to Chase whether they want to claim privilege and they haven't.

Mr. Kelley argues that the request is not cumulative or duplicative in that neither the receiver nor Chase has produced the records. He argues further that he needs the documents to determine chain of title, who the owners are, whether notice of default was in compliance with the deed of trust and properly authorized, whether the loans were in default, and the chain of custody, the promissory note and credit agreement.

Mr. Kelley also disputed statements made in the declarations of Amber Grayhorse and Ray Rivard, but has produced no evidence rebutting those statements. Under Federal Rule of Civil Procedure 45 on timely motion the Court must quash or modify a subpoena that subjects the person to undue burden. In determining undue burden the Court is to look at Federal Rule of Civil Procedure 26, which requires the Court to limit discovery that is unreasonably cumulative, or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive. *Nysdec Corp. versus Victor Company of Japan*, 246 FRD 575 at 577, Northern District of California 2007; *EEOC versus Ferramonte* 237 FRD 220 at 223, Northern District of California 2006.

In *Nysdec* the Court granted a motion to quash because the vast majority of the discovery was obtainable from the defendants, a source more direct, convenient, and less burdensome. 249 FRD at 577.

Here it is all not at all clear to the Court that the documents cannot be obtained from Chase, especially given what Mr. Zarro says, the Senior Vice President of default specially operations with Chase, filed in an unrelated case stating that database documents could be produced by Chase within a week.

Therefore, the Court grants the receiver's motion without prejudice on the ground the document request is premature. The Court sees no reason why a nonparty should be

required to produce documents that can be obtained from a party unless that party has refused to provide those documents. Even if plaintiff's allegations that Chase has altered documents are correct there's no guaranty that those alterations would not be contained in the documents produced by Chase to the FDIC and thereafter transmitted to the plaintiff. So that argument doesn't carry much water with me.

The Court notes that the cases cited by the FDIC, *Nysdec* and *Serramonte*, stand for the proposition that the Court can limit discovery that is unreasonably duplicative if that discovery can be obtained from another source that is more convenient, less burdensome, or less expensive.

It follows then from this that if the defendant cannot or won't produce the documents plaintiff would be entitled to, then plaintiff would be entitled to subpoena them from a third party, here the FDIC.

Counsel for the FDIC may submit a proposed form of order.

Mr. Kelley, you should submit a proposed form of order on the files that I told them to produce to you.

Is there anything else, because I have another matter today? Thank you.

MS. GRAY: Thank you, Your Honor.

[COUNSEL]: Thank you.

(Proceedings were concluded at 3:46 p.m.) —o0o—

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify I am not a party to nor in any way interested in the outcome of this matter.

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Dated November 18, 2013